

**COMMENT BY THE ACT LAW SOCIETY ON THE
PERFORMANCE AUDIT REPORT BY THE ACT AUDITOR-GENERAL'S OFFICE
ENTITLED "COURTS ADMINISTRATION"**

1. A number of the issues referred to in the Performance Audit Report are not within the scope of an organisation such as the Law Society to comment on in great detail. These include some of the issues with respect to governance and staffing and even some of the budgetary issues. The Law Society is clearly not in a position to conduct any exhaustive analysis with respect to matters of that sort. Accordingly, whilst the Law Society and some of its members may be in possession of some anecdotal knowledge regarding those matters, these are not necessarily sufficient to permit it to make comment that is definitive. Clearly, the Law Society is more able to do so in areas where its members have direct and regular experience such as listings and case management.

2. A lot of public debate both out of the Assembly and through the media has been generated as a result of the Report. It has also generated a significant amount of "secondary discussion" through the media consisting of things like comments from, for example, Magistrates when defended criminal hearings have been adjourned for various reasons but most particularly unavailability of particular prosecution evidence, for example, DNA. Whilst this comment does not always directly refer to the Performance Audit Report, it may reflect concern by Magistrates that the selective quoting of statistics out of the Performance Audit Report might suggest that they are not performing their functions in an efficient and proper fashion. The tenor of the Report overall does not suggest that this is the case and the unfair use of specific figures from it does little to advance the issue which is ensuring the effective operation of the Court system in the ACT. The Performance Audit Report by its own admission does not deal with all aspects of the operation of the Court including things such as the quality of the justice dispensed but rather focuses on Court administration. This necessarily has the effect that issues which are relevant to the overall quality of the performance of the Court are simply beyond the scope of this inquiry. It should be borne in mind that one of the primary conclusions drawn by the Performance Audit Report is that:

"Administration of the ACT Court system is adequate to ensure that the business of the Courts functions smoothly. However, there are

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opportunities to improve efficiency in areas such as management of case flow, finance, human resources and registry functions”.

3. Without wishing to denigrate the use of comparative statistics as a means of analysing Court performance, it ought to be borne in mind that unless a valid “apples with apples” comparison can be drawn between two jurisdictions, the statistical comparison can in fact be quite misleading. To state the obvious, the speed at which matters are determined does not necessarily reflect the effectiveness of the decision-making process and the appropriateness of the decisions reached. In particular, extreme caution ought to be exercised in interpreting information such as that referred to on pages 4 to 5 of the Report:

“Although ACT Courts have improved their performance on costs against other States in recent years, the ACT Childrens Court remained the most expensive of all jurisdictions in recent years ... The Childrens Court had the second highest [number of attendances] for the same period [2003-2004]”.

Looking at these comments in isolation, it would suggest on its face that the Childrens Court was inefficiently run. There is not, however, sufficient detail to draw a conclusion of that nature or in fact to draw any conclusion. The Childrens Court in the ACT has by statutory requirement a dedicated Magistrate and this of itself can serve to increase cost. However, the quality of the decision making in that Court has traditionally been very highly regarded by members of the local profession. Juvenile justice is a very sensitive area of community activity and of legal practice. The fact that a Court in those circumstances has more appearances before it per matter than other comparable Courts in the country which may arguably take a more statistically driven approach to Court administration does not reflect on one of the most serious ultimate questions, that is, whether the Court is delivering results that are acceptable to the community both in the short and in the long term. Likewise, the statistics referred to in the Performance Audit Report do not reflect the fact that the ACT Magistrates Court has attached to it a number of Tribunals which are serviced by Magistrates. These include Discrimination, Residential Tenancies and Guardianship. In addition, the Court exercises the jurisdiction formerly exercised by the Commercial and Retail Tenancy Tribunal. This latter jurisdiction requires Magistrates to exercise authority over disputes in

commercial and retail tenancy matters where jurisdiction in terms of amounts of money involved is unlimited. Accordingly, the disputes in that particular area can be of enormous commercial complexity and drag on over very lengthy periods of time. Likewise, the issues before the Tribunals in which Magistrates exercise jurisdiction involve a much wider range of skills and experience than the skills and experience usually required of a Magistrate in a standard Australian local Court.

4. The Law Society has considered the recommendations in the Performance Audit Report. As indicated earlier in this submission, the Law Society is not necessarily qualified by virtue of its function or its resources to comment on all of the matters dealt with by the Report. That said, provided that the ultimate focus is not merely upon a statistically driven move towards "efficiency" but is properly balanced against a consideration of the administration of justice in the Australian Capital Territory and the level of resources which the community is likely to expect, then the Law Society does not disagree with any of the recommendations although to the extent that it is in a position to provide meaningful comment. The Law Society nonetheless urges that the situation be looked at holistically with respect to recommendations such as recommendation No 5. This recommendation seems to presuppose that the Childrens Court is inappropriately expensive although, as indicated, the limited statistical material available is not sufficient to draw that conclusion. Nonetheless, the analysis of better practices from other jurisdictions in any area is likely to achieve benefits and ultimately to be worth the effort of the exercise.

5. Probably one of the key exercises which needs to be addressed is that referred to in recommendation No 17. This recommends that the Department in conjunction with the Courts conduct a fundamental review of the cost basis for Court services to support a decision for appropriate base funding. This might involve a series of steps along the following lines:
 - (a) What sort of results not only in terms of speed and cost but also in terms of quality of decision making do we want from our Courts?

 - (b) How much ought a Court of that type cost the community if run along the lines equating to "best practice" either from this jurisdiction or as found in other jurisdictions?

(c) Can the community afford that cost?

(d) If the answer to (c) is no, what compromises need to be made in terms of budget and services?

Whilst this process is perhaps a little more complicated than that referred to in the Performance Audit Report, it follows the same lines in substance. The ultimate object of the exercise would be to ensure that in an attempt to achieve efficiencies both in time and cost, we do not “throw the baby out with the bath water” and sacrifice the quality of decision making and other associated services provided by the Courts. Once it has been established how much it ought to cost to run a Court of the sort that the community might want, it will be easier to analyse performance against that budget.

6. The Law Society is interested to ensure that the process of the consideration of reports such as the Performance Audit Report should emphasise the point emphasised by the Auditor-General that any changes to the system must be consistent with the principle of independence of the judiciary. Both the Auditor-General and the Department of Justice and Community Safety appear to be well aware of this priority.
7. The recommendation with respect to the upgrading of the information technology support and capacity within the Courts would necessarily introduce efficiencies of operation. Recommendation 20 with respect to an ICT advisory group is an appropriate way of implementing proposals to bring about those efficiencies. This can bring about a number of efficiencies arising from processes such as electronic lodgement, the capacity of Magistrates and Judges to access material via computers on the Bench including electronic library access. There will no doubt be numerous other initiatives which could flow from the proper functioning of such an advisory group. It is trite, however, to state that these initiatives would need to be resourced to be effective.
8. A discrete issue which the Law Society has raised on a number of occasions which may impact to a degree on the efficiency of the operation of the Courts was the removal from the Court last year of the ACT Corrective Services officers who were previously able to provide the Court with “on the spot” reports

with respect to simple issues regarding defendants in the criminal justice system. This has caused some matters to be adjourned which could previously have been dealt with on the spot. Further time problems can arise if following an adjournment, a defendant for one reason or another did not end up making or keeping an appointment with those officers in their off-site location. It is not possible on the basis of information available to date to measure the cost of any efficiencies which may have arisen to date. If, however, one of the criteria for the performance of the Court is the number of appearances per finalisation, it is appropriate to ensure that Courts have available to them resources such as the Corrective Services resources to reduce the number of those appearances wherever possible. To do otherwise can give the appearance of having in this instance the Magistrates unfairly criticised on the basis of statistics which do not take into account particular issues with which they need to deal.

9. With respect specifically to the listing of civil matters, the current experience of the Society is that these are at acceptable levels. The case study of the Workers Compensation List at page 52 of the Performance Audit Report illustrates a model for the effective disposition of civil matters which demonstrates a high settlement rate and also illustrates the proposition that the number of hours that a Magistrate sits in a day is not necessarily co-extensive with the effectiveness of the Court system in disposing of cases. Case management in civil matters in both the Magistrates Court and the Supreme Court is hampered to some extent by the inability of the Courts to make costs orders for non-compliance with directions in routine matters. In this way, the current system is to be contrasted with case management in Courts such as the District Court of New South Wales where a very tight "hands on" directions system is in place. It is expected that with the completion of the Rules Harmonisation Project later this year, this issue will have been overcome with the Courts being provided with the capacity to make costs orders on a fairly routine basis to enforce case management systems. It is probably appropriate to defer detailed consideration of those issues until after the implementation of the Rules when an assessment of the new system is capable of being made.
10. With respect to criminal listings, recent experience of the Society is that the case management hearing system delivers reasonable efficiencies with respect to the weeding out of cases which will either be pleas of guilty or are not in a position to proceed promptly. There were some instances in the recent past of

matters being set down for hearing when the Court had been warned that they may not be ready for trial. This problem seems to have been alleviated. There is scope for further improvement in the listing system. This was addressed by a group of interested stakeholders in a meeting at the Magistrates Court in December 2005 and further work is expected to take place in that regard.

11. With respect to listings of criminal matters in the Supreme Court, the Law Society notes that the time limits of the ACT's completion of matters referred to in the Auditor-General's Report is close to average for other States and Territories. This also accords with the experience of practitioners. This suggests that there is nothing specific that needs to be done with respect to Supreme Court criminal listings subject to any suggestions which may come out of the process currently being undertaken by the Courts and the Department with respect to the implementation of the Auditor-General's Report.